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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 GARY C J DAVID,

11 Plaintiff,

12 v.

13 DAVID W SMITH, et al.,

14 Defendants.  
15  
16

CASE NO. C19-898 MJP

ORDER DENYING PLAINTIFF'S  
MOTION TO REMAND;

GRANTING DEFENDANTS'  
MOTION TO DISMISS

17 THIS MATTER comes before the Court on Defendants' Motion to Dismiss or  
18 Alternatively for a More Definite Statement (Dkt. No. 6) and on Plaintiff's Motion to Remand  
19 (Dkt. No. 7). Having reviewed the Motions, the Responses (Dkt. Nos. 9, 12), the Replies (Dkt.  
20 Nos. 14, 15), and all related papers, the Court GRANTS Defendants' Motion to Dismiss and  
21 DENIES Plaintiff's Motion to Remand.

22 **Background**

23 This case arises from Plaintiff's contention that 30 to 40 years ago his father-in-law stole  
24 his pension, with the missing funds now controlled by other members of the family. Beginning

1 when he was a teenager in 1967, Plaintiff, Gary C. J. David, worked for Northern Merchandise  
2 Company (NMC) and contributed to and participated in the retirement plan offered by NMC.  
3 (Dkt. No. 1 (“Compl.”), Ex. 1 at 4-5.) In 1970, he married his wife, Patti, the daughter of  
4 Wesley Smith and Defendant Eileen Smith, and the sister of Defendant David Smith, who is  
5 married to Defendant Ellen Smith. (Compl. ¶ 8.) Plaintiff’s father-in-law, Wesley Smith,  
6 purchased NMC in 1971. (Id. ¶ 9.) In 1981 NMC was sold to a national company called Mass  
7 Merchandisers Inc. (MMI). (Id. ¶ 12; Ex. 1.) Plaintiff left the company in 1985. (Id. ¶ 13.)  
8 Wesley Smith died in 1993. (Id. ¶ 16.)

9         Sometime around 2014, Wesley Smith’s widow, Defendant Eileen Smith, granted power  
10 of attorney to Defendants, David and Ellen Smith, Plaintiff’s brother-in-law and sister-in-law.  
11 (Id.) In December 2018, Eileen Smith moved to an assisted living facility near her son and  
12 daughter-in-law in Montana and sold her house in Washington. (Dkt. No. 12 at 5; Dkt. No. 13  
13 Declaration of David Smith (“D. Smith Decl.”) at ¶¶ 3-6.)

14         On July 17, 2014, Plaintiff turned 65 and received a letter from the IRS alerting him that  
15 he “MAY be entitled to some retirement benefits from a private employer.” (Compl. ¶17; Ex. 2  
16 (emphasis in the original).) Based on this letter, Plaintiff began an extensive search for his  
17 pension, contacting various agencies and, in December 2017, travelling to the MMI corporate  
18 headquarters in Arkansas. (Id. ¶¶ 17-19.) Plaintiff asserts that this trip helped him “put together  
19 what [he] was already figuring out – that Wesley C. Smith misappropriated [his] missing  
20 Retirement Plan.” (Id. ¶ 19.) Plaintiff also approached David and Ellen Smith many times “for  
21 assistance” locating his pension, hoping they “could help source information from Eileen’s  
22 accounts that might help [him] find [his] Retirement information.” (Id. ¶ 20.) But Plaintiff  
23 alleges they had “no intention of helping.” (Id.)  
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1 On May 8, 2019, Plaintiff filed this action in King County Superior Court, bringing  
2 claims for conversion and fraud against Eileen, David, and Ellen Smith. (Id. ¶¶ 37-38; Dkt. No.  
3 9 at 11.) Defendants then removed the action to this Court based on diversity of citizenship  
4 between the parties. (Dkt. No. 1.) Plaintiff now seeks to remand this action and Defendants  
5 have filed a Motion to Dismiss.

## 6 Discussion

### 7 I. Plaintiff's Motion to Remand

8 Plaintiff seeks to remand this case, claiming that Defendant Eileen Smith is a citizen of  
9 Washington, not Montana where she currently lives. (Dkt. No. 7 at 3.) 28 U.S.C. § 1332(a)  
10 vests the district courts with original jurisdiction in all civil actions where the matter in  
11 controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between  
12 diverse parties. A federal court must order remand if there is any defect which causes federal  
13 jurisdiction to fail, or if there is any defect in the removal procedure. 28 U.S.C. § 1447(c). The  
14 removal statutes are construed restrictively, and any doubts about removability are resolved in  
15 favor of remanding the case to state court. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir.1992).  
16 On a motion to remand, the removing defendant faces a strong presumption against removal, and  
17 bears the burden of establishing that removal was proper by a preponderance of evidence. Id. at  
18 567; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04 (9th Cir.1996).

19 Because there is no dispute that the amount in controversy exceeds \$75,000 (see Compl.  
20 at ¶ 37), nor whether there is diversity of citizenship between Plaintiff and Defendants David and  
21 Ellen Smith (Id. at ¶¶ 5-6), the only issue before the Court with respect to the remand motion is  
22 whether Defendant Eileen Smith is a citizen of Montana.  
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1 To establish state citizenship for the purpose of diversity jurisdiction, a person must (1)  
2 be a United States citizen, and (2) be domiciled in a State. Lew v. Moss, 797 F.2d 747, 749 (9th  
3 Cir.1986). Plaintiff challenges whether Montana is Defendant Eileen Smith’s domicile, which is  
4 determined by evaluating such factors as current residence, location of personal and real  
5 property, and location of family. Id. at 750. The Parties appear to agree on the relevant facts:  
6 Eileen Smith lives in Montana, her house in Washington was sold, and she now lives near her  
7 care-givers who hold her power of attorney. (Dkt. No. 7 at 4-5; Dkt. No. 15 at 7.) Plaintiff has  
8 not contradicted Defendants’ assertion that Eileen Smith has no intention to move back to  
9 Washington, other than his claims that she is “very unhappy living in Montana.” (Id. at 4.)  
10 Because the record demonstrates Eileen Smith’s domicile is in Montana, Plaintiff’s Motion to  
11 Remand is DENIED.

## 12 **II. Defendants’ Motion to Dismiss**

### 13 **A. Legal Standard**

14 Under Fed. R. Civ. P. 12(b)(6), the Court may dismiss a complaint for “failure to state a  
15 claim upon which relief can be granted.” In ruling on a motion to dismiss, the Court must  
16 construe the complaint in the light most favorable to the non-moving party and accept all  
17 well-pleaded allegations of material fact as true. Livid Holdings Ltd. v. Salomon Smith Barney,  
18 Inc., 416 F.3d 940, 946 (9th Cir. 2005); Wyler Summit P’ship v. Turner Broad. Sys., 135 F.3d  
19 658, 661 (9th Cir. 1998). Dismissal is appropriate only where a complaint fails to allege  
20 “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly,  
21 550 U.S. 544, 570 (2007). A claim is plausible on its face “when the plaintiff pleads factual  
22 content that allows the court to draw the reasonable inference that the defendant is liable for the  
23 misconduct alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Where, as here, a  
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1 plaintiff appears pro se, the Court must construe his pleadings liberally and afford the plaintiff  
2 the benefit of the doubt. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th  
3 Cir. 1988).

#### 4 **B. Statute of Limitations**

5 Plaintiff's claims are barred by the statute of limitations, which is three years for both  
6 conversion and fraud. RCW 4.16.080(2), (4); Hudson v. Condon, 101 Wn. App. 866, 873  
7 (2000). In many instances an action accrues "immediately when the wrongful act occurs, but in  
8 some circumstances where the plaintiff is unaware of harm sustained, a 'literal application of the  
9 statute of limitations' could 'result in grave injustice.'" 1000 Virginia Ltd. P'ship v. Vertecs  
10 Corp., 158 Wn. 2d 566, 575 (2006), as corrected (Nov. 15, 2006) (quoting Gazija v. Nicholas  
11 Jerns Co., 86 Wn.2d 215, 220 (1975)). To avoid this injustice, courts have applied a discovery  
12 rule of accrual, under which the cause of action accrues when the plaintiff discovers, or in the  
13 reasonable exercise of diligence should discover, the elements of the cause of action. Vertecs  
14 Corp., 158 Wn. 2d at 575-76. This does not mean that the action accrues when the plaintiff  
15 learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff  
16 discovers the salient facts underlying the elements of the cause of action. Id. at 576.

17 In this case, even with the aid of the discovery rule, Plaintiff's claims are untimely. First,  
18 because Plaintiff "participated in and contributed to the Retirement plan" while working for  
19 NMC from 1967 through 1985 and was therefore aware he had some form of retirement savings,  
20 the exercise of due diligence required Plaintiff to check the status of his retirement fund,  
21 including the status of any possible pension, when he left the company in 1985, if not earlier.  
22 (Compl. ¶ 8.) But even if the Court were to apply the discovery rule and toll the date Plaintiff's  
23 claims accrued by finding that Plaintiff first learned of his missing pension when he received a  
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1 letter from the IRS in 2014, he knew or should have known of his claims nearly five years before  
2 he filed his complaint in May 2019. (Dkt. No. 1, Ex. 1; Dkt. No. 9 at 11.)

3 Plaintiff has provided no basis for the Court to further toll his claims based on a  
4 decades-old injury. While Plaintiff contends that it was not until 2017 that he realized that  
5 “Wesley Smith stole [his] pension,” he fails to explain why he waited another two years to file  
6 this action. (Dkt. No. 9 at 5.) According to Plaintiff, he ultimately learned the facts of his claim  
7 by performing an investigation that was entirely within his control: contacting “many  
8 organizations,” driving to Arkansas to speak with past management of MMI, and viewing  
9 records of the parent company. (Dkt. No. 9 at 6.) Because Plaintiff has not demonstrated  
10 diligence in pursuing his claims, or that he was not at fault for the delay, his claims are barred.

### 11 **Conclusion**

12 For the reasons stated herein, Plaintiff’s Motion to Remand is DENIED and Defendants’  
13 Motion to Dismiss is GRANTED. Plaintiff’s claims are hereby dismissed.

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15 The clerk is ordered to provide copies of this order to all counsel.

16 Dated August 15, 2019.

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19 Marsha J. Pechman  
20 United States District Judge  
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